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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 648

ELIZABETH C. BARNES,
Petitioner,

v.

THE A. S. ABELL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The Daily Record Co., Baltimore, Md. 21203

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered when the Petition for Reargument was denied on June 9, 1970; the opinion was filed on May 7, 1970.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 258 Md. 56, 265 A. 2d 207, and is printed in Appendix A, *infra,* pages 1a-23a.

JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on May 7, 1970, Appendix A, *infra,* pages 1a-23a. Rehearing was denied on June 9, 1970, without opinion and the

mandate and judgment issued on that day. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257(3).

QUESTION PRESENTED

Did not the Court of Appeals of Maryland err in barring recovery under the constitutional guarantees of free press on the grounds that Petitioner was a public figure when that Court failed to consider whether at the time of the publication of the defamatory article Petitioner commanded either sufficient independent or continuing public interest so as to provide access to the means of counter argument to be able to expose through discussion the falsehood of the defamatory statements?[1]

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States providing, in relevant part, that ". . . no State shall deprive a citizen of the United States of life, liberty or Property without due process of Law. . . ."

2. The First Amendment to the Constitution of the United States providing, in relevant part, that: "The Congress shall pass no law . . . abridging the freedom of speech or of the press. . . ."

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[1] There are subsidiary questions fairly comprised in, or flowing from, the question stated. These are, e.g., whether or not the Court of Appeals of Maryland erred (a) in making an "Independent Constitutional Judgment" on *part of*, but not upon the *"whole record"*; (b) in not remanding the case for a determination by the jury, under proper instructions, whether the Petitioner was a "public figure"; and, (c) assuming for the argument that the Petitioner was found to be a "public figure" and the *New York Times — Butts* criteria applied to her, whether there was sufficient evidence from which the jury, under proper instructions, might reasonably and properly find that the Reporter had either (1) actual knowledge of the falsity of the defamatory publication or (2) a reckless disregard of whether or not it was false. These subsidiary questions, however, would be more properly developed in the Petitioner's Brief on the merits, and at

STATEMENT

The Petitioner, as plaintiff in the Baltimore City Court, recovered a jury verdict and judgment for $7,500.00 compensatory damages, but no punitive damages, against the Respondent, the Defendant, The A. S. Abell Company, publisher of "The Evening Sun" in a Libel Action. This action was to recover damages for injuries to the reputation of the Petitioner and to her professional standing as a member of the Bar resulting from a false statement published in "The Evening Sun" of June 16, 1967 that the Petitioner had not filed a required report of receipts and disbursements under the Maryland Corrupt Practices Act, Maryland Code (1957), Art. 33, §223. Violations of this statute are a crime for which punishment may be imprisonment for one year or a fine of $1,000.00 or both in the discretion of the Court (Art. 33, §233). The Petitioner, Mrs. Barnes, had in fact filed the required report and there is no dispute that under the State law such a false publication was libellous *per se*.

The Respondent, The A. S. Abell Company timely filed pleas raising its alleged Constitutional Rights under the First and Fourteenth Amendments to the Federal Constitution (E. 7-8).[2] The Respondent also presented the same point in its motions to dismiss at the end of the Plaintiff's case (E. 74) and at the end of the entire testimony (E. 122). It also raised the same point in its requests for instructions (E. 122) but the Trial Court ruled as a matter of law that the Petitioner was neither a "public official"

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argument, rather than in the present Petition for Certiorari. The question stated is the fundamental and vitally important question which this Court should consider at this time.

[2] References are to the certified copy of the Joint Record Extract — the printed record before the Court of Appeals of Maryland in the present case, "E" being the abbreviation for "Extract" in accordance with the Maryland Practice.

nor a "public figure" so that the Federal criteria in *New York Times* and *Butts* did not apply. The Trial Court directed a verdict for the Petitioner on the question of Liability under the State Law (E. 125) and left the question of Damages — nominal, compensatory and punitive — to the jury under elaborate instructions (E. 125-132). The Respondent duly excepted to the refusal of the Trial Court to instruct the Jury that the Federal Constitutional Criteria did apply and that there was no Liability on its part because it contended that there was no sufficient evidence from which the jury could find that the federal criteria had been violated (E. 122-123). The Respondent briefed and argued these same points on the appeal in the present case. The Court of Appeals of Maryland ruled that, as a matter of Law, the Petitioner, although not a "public official", was a "public figure", that the federal criteria did apply and there was insufficient evidence from which the Jury could have found that there was a violation of the Federal Criteria and, hence, there should be no remand of the case for a new trial (Appendix A, pages 1a to 23a). There seems little doubt that a substantial federal question was raised in the Trial Court and decided by the Court of Appeals of Maryland adversely to the Petitioner.

When the General Assembly of Maryland passed Legislation for the calling of a Constitutional Convention, the Delegates to that Convention were to be elected in a non-political, non-partisan special election (without a prior primary election) to be held on June 13, 1967 (E. 9). The then Governor (now Vice-President) Agnew called upon persons without political experience or prior office holding — ordinary citizens — to seek election as Delegates to the Convention (E. 25).

The Petitioner, Mrs. Barnes, who had never held public office and who had never engaged in any political activity, responded to the Governor's suggestion and filed as a candidate in the Fifth Legislative District of Baltimore City. The Petitioner had had a good education. She had graduated from Bryn Mawr College, *Cum Laude,* in 1928 with an A.B. degree and later from the University of Maryland Law School, *Cum Laude,* with an LL.B. degree. She was in due course admitted to the Bars of the Federal and State Courts, but never practiced law, having been shortly thereafter married to Wilson K. Barnes, now (and since 1964) an Associate Judge of the Court of Appeals of Maryland. She was a housewife and mother, interested and active in various lineage and patriotic societies. She retained her interest in Constitutional Law, discussing various aspects of that law with her late father, Honorable W. Calvin Chesnut, United States District Judge for the District of Maryland (1931-1962) and also with her husband, Judges Barnes (E. 25).

She sent the Respondent, The A. S. Abell Company, a synopsis of her qualifications as requested by it (E. 81), the record is silent in regard to any mention of the Petitioner in any of the Sun papers prior to the publication of the defamatory article on June 16, 1967, *three days after the special election* held on June 13, 1967 at which the Petitioner *was not elected as a delegate.*

The Petitioner had asked Bernard J. Flynn, Esquire, former United States Attorney for the District of Maryland, then retired, to be Chairman of a "Citizens Committee for the Election of Elizabeth C. Barnes". Mr. Flynn consented to do this. The Citizens Committee, however, was merely a *pro forma* group, had no activities and no money was contributed to it for use during the special election (E. 29-30, 52, 108).

In accordance with the Maryland Corrupt Practices Act (the Act),[3] the Petitioner designated Mrs. Phyllis M. Chait, also a housewife, as Treasurer for the Petitioner, Mrs. Barnes, and later, also as Treasurer of the Citizens Committee.

As required by the Act, the Petitioner and Mrs. Chait, as Treasurer, filed a Report of Receipts and Disbursements of Money used in the special election *seven days prior* to the date of the special election. No such report was filed for the Citizens Committee in that no funds had been collected for that Committee, the Act providing that no report need be filed unless more than $50.00 was disbursed by such a Committee (E. 103-104). As indicated, the Petitioner, Mrs. Barnes, was *defeated* in the special election, along with 80 other candidates (E. 146).

On June 16, 1967 — three days after the special election on June 13 — the Respondent published the defamatory article involved in this case in "The Evening Sun", with a circulation for that day of approximately 212,000 copies.

The defamatory article, prepared by Jerome Kelly, an employee of the Respondent, and published under his name, after referring to the requirements of the Act, including the statement "Convicted violators (of the seven day filing requirement) are subject to $1,000 fines and/or one year jail sentences", and the provision that the failure to file the report would, upon challenge, cause the *winners* to lose their election at the special election (E. 145-146), then stated:

> "Two of the losing candidates who did not file reports were Thomas N. Biddison, Jr. and Robert A. Sapero,

[3] The Attorney General of Maryland had ruled that candidates for delegates in the special election were required to comply with this Act.

both assistant prosecutors in the Moylan office. A third was Mrs. Elizabeth C. Barnes, wife of Judge Wilson K. Barnes, of the Maryland Court of Appeals.

REGARDED AS CRIMINAL

Because of the loosely defined State Code, any violation that results in a fine or sentence is regarded as a criminal act.

Mr. Moylan said he did not think the Corrupt Practices Act was fair, especially when applied to the special convention election and the political amateurs who participated.

Moreover, seven committees working for the election of individual and collective candidates also failed to meet filing requirements" (E. 147).

Later in the defamatory article, the Petitioner was *again* named in the "Complete List" of candidates who allegedly failed to file a report in the Fifth District (E. 148). Still later in the defamatory article, various committees which had allegedly failed to file reports were listed (E. 149).

The Petitioner on June 19, 1967, wrote the President of the Respondent protesting against the false statement and pointed out that she had signed the required report on June 5, 1967 which was filed in the Clerk's Office on June 6, 1967, seven days prior to the special election as required by the Act (E. 149-150). She stated that a superficial examination of the records in the Clerk's Office would have disclosed that she had filed, a telephone call would have revealed the true situation, and the Clerk's Report to the State's Attorney of those candidates not filing (required by the Act to be filed) *did not include* the Petitioner's name as having failed to file the required report. Mrs. Barnes further observed in her letter that the statement was libellous *per se* for two reasons: (1) charging her falsely

with the commission of a crime, and (2) injuring her in her profession. She further stated that apart from this, the singling her out for particular comment three days after the election, the immediate charge of criminal conduct and other circumstances had lead her "reluctantly but necessarily to conclude that the publication of the false material was done with a reckless disregard of the truth and with malice" (E. 151). The Respondent, in reply, admitted that the statement in regard to the Petitioner was "incorrect" (E. 151). The Petitioner then referred the matter to her Counsel and the libel action against the Respondent was filed on July 13, 1967 (E. 1, 3).

The Chief Deputy Clerk of the Circuit Court of Baltimore City (in whose office the reports under the Act were required to be filed) testified in regard to the method of filing the reports. He prepared a Master Sheet and made up index cards. He then folded the paper received and put it in a cabinet (E. 10). A photograph of the four cabinets in which the reports were filed are shown on Plaintiff's Exhibits Nos. 1-4 (E. 135). A registration number, in the order the papers are received, is placed on each paper for identification purposes and is entered on the Master Sheet. The paper first filed was the Designation by the Candidate of the Treasurer or, if a Committee is involved, a designation by the Chairman of the Committee, of its Treasurer. On the back of this paper is typed the name of the Treasurer and the name of the person or the Committee for whom it is filed. When a report of receipts and disbursements is filed, the date of the filing is noted on the report and on the Master Sheet, and the report is then placed inside the Designation of Treasurer. This procedure was followed for the prior seven day notice and for the thirty day report filed after the special election (E. 12-13).

The two sets of relevant filings were marked by the Deputy Clerk, as follows:[4]

"No. 26	"No. 300
Phyllis M. Chait Treasurer for Elizabeth C. Barnes"	Phyllis M. Chait Treasurer for Citizen's Committee for Election of Elizabeth C. Barnes"
(E. 137)	(E. 138)

On June 15, 1967 — two days after the special election at which the Petitioner was defeated — Mr. Kelly for the Respondent and Frank Anthony DeFilippo, a Reporter for the "News-American", met at a lunch room, discovered that they were on similar assignments to check the candidates who had failed to file the seven-day reports, decided to check the reports together. When they reached the Clerk's Office, they discovered that the Deputy Clerk had prepared a list of candidates who had not filed their reports (required by the Act to be filed by the Clerk with the State's Attorney of Baltimore City), but the list was not available to them (E. 76). They then proceeded to check the Original Records, filed as stated above, Mr. Kelly looking at the Documents and Mr. DeFilippo noting information in his papers, by circling a list of candidates Mr. DeFilippo had brought with him (E. 77). Mr. Kelly had also brought a list of candidates with him, but this was misplaced at the Clerk's Office, so that Mr. Kelly told Mr. DeFilippo that Kelly would return to his office, obtain another list, call DeFilippo and get the information he had on his list (E. 77-78). Mr. Kelly did this, marking Designations on his "new" list after a telephone conversation with Mr. DeFilippo.

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[4] The difference in number, language and number of lines between the respective written Designations will be noted.

Mr. Kelly further testified that he prepared the defamatory article the morning of June 16, 1967 (E. 79). He made an original and three carbon copies of the article on his typewriter (E. 84). The original went to the City Desk. He retained one of the carbon copies and sent the other two carbon copies with the original. He kept the retained copy of his article in his desk for a period "normally about six weeks to two months" and normally he would have retained the copy of the article in question until the middle of July, 1967 (E. 85). He admitted that he was "confronted" with a letter from Mrs. Barnes shortly after the publication of his article. Later he testified that although he searched his desk, he could not find either the copy of the original article or the list he had made (E. 85-86). At his deposition of September 12, 1967, Mr. Kelly stated that he could not find any papers in his desk and no paper was produced at the deposition. At the Trial, however, Mr. Kelly testified that he "subsequently found the List, I suppose" (E. 87) and he thought "I turned over what I had to my Attorneys" (E. 88). No documents, however, were produced by either Mr. Kelly or by his counsel.

Mr. Kelly admitted on cross-examination that he "must have seen" Document "No. 26", but that he didn't look inside (E. 93, 96). He thereafter saw Document No. 300 and "guessed" that he had mis-identified the Committee's filing for the candidate's filing (E. 94). He stated, in reply to a question in regard to why he did not go back to No. 26 to ascertain if a report had been filed for the candidate, that "I hadn't made the distinction between the candidate and the Committee" (E. 96). He admitted that he could read and that he could "see on the face of it (No. 300) that it stated: Treasurer for Citizens Committee for the Election of Elizabeth C. Barnes" (E. 97). There was nothing in any of the Documents that referred to "the name of Judge Wilson K. Barnes" (E. 98).

After completing his telephone call to Mr. DeFilippo, Mr. Kelly then called Mr. Moylan, the then State's Attorney for Baltimore City, to find out what the State's Attorney was going to do with the list the Deputy Clerk, Mr. Cohen, had compiled (E. 99). When pressed in regard to whether he was attempting to determine whether or not the State's Attorney was going to have those failing to file reports "indicted and prosecuted", Mr. Kelly stated that he did not "remember the precise language along those lines. We discussed what he would do with the list of delinquent candidates" (E. 99).

Mr. Kelly also admitted that after he placed the material on his desk and went home on June 15th and the following morning, he made no effort to communicate by telephone or otherwise with the Petitioner, Mrs. Barnes, her Treasurer, Mrs. Chait, the Chairman of the Citizens Committee, Mr. Flynn, or with Judge Barnes, whose principal office is in the State Court House where the records were filed, just two floors above the Circuit Court Clerk's Office (E. 100). All of these persons were available and any one of them could have told Mr. Kelly that the Petitioner had filed her report.

Mr. Kelly also stated on cross-examination that before he wrote the defamatory article, he had gone to the library, obtained a copy of the Maryland Election Laws and had read the relevant portions of those laws in regard to the Act and its requirements (E. 102). Counsel for the Petitioner pointed out to Mr. Kelly that Section 214, subparagraph B of the Act provides that if a Committee had not disbursed more than $50.00, it was not required to file a financial report (E. 104).

Mr. Kelly also testified that the only candidate whose spouse was identified in any way was Mrs. Barnes "as

being the wife of a Judge". He singled out Mrs. Barnes and two assistant prosecutors from the State's Attorney's Office and bracketed them together "because of their legal standing", adding Mrs. Barnes he guessed "because of her connection with the Court" — "because she is married to a Judge" (E. 106-107).

Mr. Flynn confirmed the testimony of Mrs. Barnes and the Treasurer, Mrs. Chait, that the Citizens Committee had no meetings of any kind and collected no money (E. 108).

The Managing Editor of "The Evening Sun", Mr. Heisler, testified for the Respondent. On cross-examination he made most significant admissions and statements relating to whether or not the Petitioner was a "public figure". *These statements and admissions are not mentioned in the Opinion of the Court of Appeals of Maryland, but are obviously of great importance to a resolution of the present case.* He stated: That he did not know the Petitioner, Mrs. Barnes, personally and then testified:

> "Q. YOU HAD NO KNOWLEDGE OF HER BEING A NEWSWORTHY PERSON OR ANYTHING OF THAT KIND? A. NO, SIR.
>
> Q. AS OF THE DATE OF THE PUBLICATION OF THIS ARTICLE, DID YOU KNOW THAT SHE WAS THE WIFE OF JUDGE WILSON K. BARNES? A. YES, AFTER I READ THE ARTICLE.
>
> Q. BUT NOT BEFORE THE ARTICLE? A. I WAS NOT AWARE OF IT."

The Trial Court directed a verdict against the Respondent on the question of liability taking the position that the defamatory publication falsely charging the commission of a crime was libellous *per se* (as it is under the State Law) and that the Petitioner, Mrs. Barnes, was neither a "public official" nor a "public figure" as a matter of law there being no evidence that she was in either classification,

so that the federal criteria in *New York Times* and *Butts* did not apply. The Trial Court gave elaborate instructions on the question of damages — nominal, compensatory and punitive — the Petitioner having taken exception to the charge in regard to punitive damages and, having taken a cross appeal presented her position in this regard to the Court of Appeals of Maryland (E. 3). The Court of Appeals did not find it necessary to pass upon this issue as there was no remand; and this issue is, of course, not before this Court on this Petition, but in the event the Writ of Certiorari is granted and the judgment of the Court of Appeals reversed and the case remanded, the Court of Appeals would consider this issue upon the remand.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS OF MARYLAND HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION IN A WAY NOT IN ACCORD WITH THE APPLICABLE DECISION OF THIS COURT IN *CURTIS PUBLISHING COMPANY v. BUTTS*, BY HOLDING PETITIONER TO BE A "PUBLIC FIGURE" WITHOUT CONSIDERING WHETHER PETITIONER AT THE TIME OF THE DEFAMATORY PUBLICATION, COMMANDED EITHER SUFFICIENT INDEPENDENT OR CONTINUING PUBLIC INTEREST SO AS TO PROVIDE ACCESS TO THE MEANS OF COUNTER-ARGUMENT TO BE ABLE TO EXPOSE THROUGH DISCUSSION THE FALSEHOOD OF THE DEFAMATORY STATEMENTS.

Although it seems clear that the rationale of both *New York Times v. Sullivan*[5] and *Curtis Publishing Company v. Butts*[6] is a two-dimensional concept involving the balancing of the public's right to free, prompt and unfettered discussion of political, governmental and other public issues, on the one hand, with the strong interest of society

[5] 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).
[6] 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

in protecting reputation against false and defamatory statements, on the other, the Court of Appeals of Maryland has taken the erroneous position that it is a one-dimensional concept whereby the publication of defamatory matter having *any* public interest, *ipso facto*, falls under the penumbra of constitutionally-protected speech.

The landmark case of *Curtis Publishing Company v. Butts* and its companion case of *Associated Press v. Walker* (hereinafter referred to as *Butts* or *Walker*) held that the "actual malice" standard of *New York Times v. Sullivan* applies to "public figures". The plurality opinion of Mr. Justice Harlan made it clear that a "public figure" is one at the time of the defamatory publication commands a "substantial amount of independent public interest" or "sufficient continuing public interest" to have access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.[7] The seven members of this Court who deemed it necessary to pass upon the question agreed that the Respondents were "public figures" as set forth in the plurality opinion. Thus the "public figure" doctrine became an established precedent in this Court and was reaffirmed in the recent case of *Greenbelt Cooperative Association v. Bresler*.[8]

The decision in *Butts* represented a compromise between the tension created by society's interest in free, prompt and

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[7] 388 U.S. at 154-5, 87 S. Ct. at 1991, 18 L. Ed. 2d at 1111.

[8] ____ U.S. ____, 90 S. Ct. ____, 26 L. Ed. 2d 6, The disagreement with the plurality reasoning came over the question of establishing for public figures a standard more restrictive to publishers than that for "public officials". See the concurring opinion of former Mr. Chief Justice Warren at 87 S. Ct. at 1995. See particularly the following remark by Mr. Chief Justice Warren: "And surely as a class these 'public figures' have as ready access to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of *such* persons." *Butts* at 163-4. (Emphasis supplied.)

unfettered discussion of issues of public importance, and society's "pervasive and strong interest in preventing and redressing attacks upon reputation."[9] As put by Mr. Justice Harlan: "We fully recognize the force of these competing considerations and the fact that an accommodation is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues."[10] The resulting accommodation substitutes access to the means of counterargument for monetary damages as the remedy for defamatory statements concerning matters and persons of such public interest that the former remedy becomes available. The result reached recognizes that some public issues and public focus upon persons substantially connected therewith can be so intense that the force of public interest provides the defamed party with a sufficient forum in which to rebut the impact of the defamatory statements. In other instances the interest of the public in certain individuals apart from the charges in controversy is great enough to provide access to the means of counterargument.

In the closely related cases of *New York Times v. Sullivan* and its progeny in this Court, the Court has consistently pointed out that *mere* public interest is insufficient to invoke the "actual malice" standard. In *New York Times* the Court remarked that it had no occasion "to determine how far down in the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included."[11] In *Rosenblatt v. Baer*[12] this Court stated that "a conclusion that the *New York Times* malice standards apply could not be reached

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[9] 388 U.S. at 1987.
[10] *Butts, supra* at 1987 citing *Rosenblatt v. Baer.*
[11] 376 U.S. at 283 N. 23; 84 S. Ct. at 727, 11 L. Ed. 2d at 708.
[12] 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966).

merely because a statement defamatory of some person in government employ *catches the public's interest;* that conclusion would virtually disregard society's interest in protecting reputation." (Emphasis supplied).[13]

The opinion of the Court of Appeals of Maryland in the instant case made reference to the just-cited footnote in *Rosenblatt v. Baer,* but completely missed its significance by following the footnote with this comment: "Butts and Walker, as we have noted, was concerned with 'public figures'. The *Harlan opinion did not define 'public figure'."*[14] It is submitted that the underscored statement was error of constitutional magnitude. By failing to take cognizance of *all* of the guidelines set forth by Mr. Justice Harlan in regard to public figures,[15] the Maryland Court missed the thrust of the compromise that was reached in *Butts,* preferring to treat the *Butts* rule as a one-dimensional concept concerned only with society's interest in unfettered expression.

The best evidence of the Maryland Court's misunderstanding of the guidelines set forth in the *Butts* case was provided in the following paragraph purporting to sum up the *Butts* rules, *inter alia:*

> "We gather from the whole of *New York Times, Rosenblatt* and *Butts* and *Walker* that . . . while a person who is a public official is obviously a public figure, a person may be a public figure without being a public official. A person, not a public official, may be a public figure by position alone, as was Butts, or he may become a public figure by purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy as did

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[13] 383 U.S. at 87, N. 13; 86 S. Ct. at 676, 15 L. Ed. 2d at 606.

[14] Appendix A, page 7a, 258 Md. 56, 265 A. 2d at 213. (Emphasis supplied.)

[15] 388 U.S. at 154-55, 87 S. Ct. at 1991, 18 L. Ed. 2d at 1111.

> Walker, or by seeking to lead in the determination of policy, or, because, by any reasoning, he is a public man in whose public conduct society and the press have a legitimate and substantial interest. In sum, for first amendment purposes, whether a person is a public figure, *vel non*, depends, within the guidelines set out, upon the facts and circumstances of the particular case."[16]

If the first part the Maryland Court's syllogism was correct in stating that every public official is a public figure, no public official no matter how far down the rung would escape the *New York Times* malice standard. Second, the above-cited paragraph purporting to sum up *all* of the applicable factors regarding "public figures" makes no mention of the following balancing guidelines set forth in *Butts*, to wit: command of a substantial amount of independent public interest at the time of the publications; command of sufficient continuing public interest to provide sufficient access to the means of counterargument.[17]

By failing to comprehend the importance of protection of reputation as a factor in the *Butts* "public figure" formula, the result in the instant case becomes preordained. The Court of Appeals held as follows:

> "On the facts it is our independent constitutional judgment that appellee was not a public official but was a public figure. She held no elective office; she was not a government employee; she held no position in government; thus she was not a public official. However, we find that she was a public figure whether it be considered that she became such by her position as candidate for election as delegate to the Constitutional Convention; or by the purposeful activity on her part amounting to a thrusting of her personality into

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[16]Appendix A, pages 9a and 10a.

[17] 388 U.S. at 154-55, 87 S. Ct. at 1991, 18 L. Ed. 2d at 1111.

> the vortex of an important public controversy; or by seeking to lead in the determination of policy in an important public matter; or because simply by her candidacy and campaigning she became a public person in whose conduct society and the press had a legitimate and substantial interest."[18]

The part of the *Butts* "public figure" formula which protects the individual interest in reputation was neither mentioned nor applied by the Maryland Court in its holding.

Had the Maryland Court of Appeals applied the full *Butts* formula, the Court would have necessarily considered the testimony of the Managing Editor of Respondent's Evening Sun publication, who, testifying for Respondent, stated on cross-examination that he did not know the Petitioner personally, did not know prior to reading the defamatory articles that she was the wife of Judge Barnes and (most significantly) that he "had no knowledge of her as being a newsworthy person or anything of that kind."[19] It would be difficult to find more convincing evidence coming from a witness for the Respondent and from one obviously an expert on who is "newsworthy", to indicate that Petitioner did not have the "independent public interest" nor command "sufficient access to the means of counter-argument" to make her a "public figure" within the meaning of *Butts*. The Court of Appeals in applying the proper standard would also have considered the fact that there was no evidence in the record that Respondent in any of its newspapers ever published anything in regard to Petitioner's qualifications (or the lack of them), although Respondent had requested that Petitioner and all other candidates furnish a synopsis of their backgrounds, and had received such a synopsis.[20] Finally, the Court would

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[18] Appendix A, page 17a.
[19] E. 111.
[20] E. 81, 150.

have considered the admission by the reporter that Petitioner was singled out in the defamatory article not because of her individual achievements but *merely* because she was the wife of a Judge.[21]

The Petitioner's position in the instant case was thus clearly distinguishable from the situations in *Butts* and in *Greenbelt Coop. Pub. v. Bresler*.[22] Butts was a nationally known sports figure commanding instant and sustained attention by the news media. In its companion case of *Walker,* General Walker was also a newsworthy figure, much in the public press, which gave him an existing position as a public figure which in turn enabled him to rebut the false charges against him. In addition, he thrust himself into the center of a burning public issue commanding immediate and substantial public interest regarding his role of leadership, which interest alone *might* have given him sufficient access to rebut the defamatory charges.

In the present case, the record shows that the Court of Appeals of Maryland has previously held that the position of Delegate to the Constitutional Convention was not an "office of trust and profit" under the existing Maryland Constitution (E. 157). See *Board of Supervisors v. Attorney General,* 246 Md. 415, 439-442, 229 A. 2d 388, 393-394 (1967). The Governor of Maryland had invited non-political, ordinary citizens to participate in the non-partisan election of delegates and the Petitioner, who had never held public office of any kind or exercised political influence of any sort, responded to that invitation (E. 25). There was no "vortex" into which one could thrust oneself and the Petitioner can hardly be said to have "thrust" herself into the situation as did General Walker.

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[21] E. 107.

[22] ..... U.S. ....., 90 S. Ct., ..., 26 L. Ed. 2d 6.

In *Bresler* the Respondent admitted that he was a public figure thus, obviating the necessity for a lengthy discussion of the subject by this Court; nonetheless, Bresler's position as a state legislator in another county, the degree of his voluntary involvement as a developer in several negotiations of great public concern, the influential nature of his involvement in negotiations which produced the allegedly defamatory article, meant that Bresler was so deeply involved in the future development of the City of Greenbelt that public interest, if not his own position, would have given him sufficient access to the means of counterargument.

The present case is also to be distinguished from this Court's Decision in *Time, Inc. v. Hill,* 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967), which involved a *statutory action* under a statute involving invasion of privacy and not a libel action at all. Mr. Justice Brennan stated:

> "Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. Rosenblatt v. Baer, 383 U.S. 75, 91, 86 S. Ct. 669, 679, 15 L. Ed. 2d 597, 608 (Stewart J., concurring)."

Mr. Justice Stewart in his concurring opinion in *Rosenblatt v. Baer* aptly stated "Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." (383 U.S. at 94, 86 S. Ct. at 680, 17 L. Ed. 2d at 610.)

The record in the instant case, on the other hand, shows that Petitioner was a small fish in a large sea of candidates. Petitioner was one of *80* losing candidates. Having failed to attract sufficient public interest as a candidate, Petitioner could hardly be said to have gained it after her *defeat in*

the election, when she was not in a position to influence any matter of public interest.

It is submitted that this case presents a necessary and convenient vehicle for this Honorable Court to clarify its holding in *Butts* regarding the definition of a "public figure", as well as do justice in the instant case. To fail to do so will surely encourage other lower courts, both State and Federal, to compound the error of the Maryland Court and lead to further petitions and appeals to this Court. And on the merits, to permit the Maryland Court's one-dimensional view to prevail would discourage all but the most insensitive (and the press) from participating in the free exchange of ideas and would grant the press a power neither contemplated by the Constitution nor commanded by the dictates of reason and common sense.

II.

THE ERROR OF THE COURT OF APPEALS OF MARYLAND IS NOT CONFINED TO THAT COURT; THERE IS A DIVISION IN THE AUTHORITIES ON THIS VERY QUESTION AND THIS COURT SHOULD, IN THE PUBLIC INTEREST, NOW RESOLVE AND CLARIFY THE BASIC NATURE AND SCOPE OF THE FIRST AMENDMENT RIGHT INVOLVED.

For the purposes of this Petition, the Petitioner will merely list conflicting Federal and State Cases.

A. Two Dimensional Cases

Federal

New York Times v. Sullivan, supra;
Curtis Publishing Co. v. Butts, supra;
Rosenblatt v. Baer, supra.

Goldwater v. Ginzburg, 261 F. Supp. 784 (S.D. N.Y. 1966) 414 F. 2d 324;
Pauling v. News Syndicate Co., 335 F. 2d 659 (C.A. 2, 1964);
Thompson v. Evening Star Newpaper Co., 394 F. 2d 774 (C.A.D.C., 1968).

State

Faulk v. Aware, Inc., 14 N.Y. 2d 954, 253 N.Y.S. 2d 990, 202 N.E. 2d 372 (1964);
Dempsey v. Time, Inc., 43 Misc. 2d 754, 257 N.Y.S. 2d 186, Aff. 22 App. Div. 2d 854, 254 N.Y.S. 2d 80 (1964);
Zech v. Spiro, 52 Misc. 2d 629, 276 N.Y.S. 2d 394.

B. ONE DIMENSIONAL CASES

Federal

Hurley v. Northwest Publication, Inc., 273 F. Supp. 967 (D. Minn. 1967), Aff. 398 F. 2d 346 (C.A. 8, 1968);
Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla., 1969);
Arizona Bio Chemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y., 1969) *Dicta;*
Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S.D. Ga., 1969).

State

The Instant Case, *The A. S. Abell Co. v. Barnes*, 258 Md. 56, 265 A. 2d 207 (1970);
Eadie v. Pole, 91 N.J. Sup. 504, 221 A. 2d 547 (1966);
Turley v. W.T.A.X., Inc., 94 Ill. App. 2d 377, 236 N.E. 2d 778 (1968).

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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ALAN H. MURRELL,
WILLIAM A. HEGARTY,
Of Counsel.

APPENDIX A

In The

Court of Appeals of Maryland

No. 311

September Term, 1969

The A. S. Abell Company,

Appellant and
Cross-Appellee,

vs.

Elizabeth C. Barnes,

Appellee and
Cross-Appellant.

Appeal from the Baltimore City Court (Bowie, J.)

Before Hammond, C.J., Finan, Singley, Smith, Digges, Murphy, Robert C. (Specially Assigned) and Orth, Charles E., Jr. (Specially Assigned), J.J.

Opinion By Orth, J.

Filed May 7, 1970

On 9 March 1964 the Supreme Court of the United States decided *New York Times Company v. Sullivan*, 376 U.S. 283. *New York Times* sired *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Linn v. United Plant Guard Wkrs. of Amer., Loc. 114*, 383 U.S. 53 (1966); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts* and *The Associated Press v. Walker*, reported together in 388 U.S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *St. Amant v. Thompson*, 390

U.S. 727 (1968); and *Pickering v. Board of Education*, 391 U.S. 563 (1968). One of the things the prolific *New York Times* and its progeny did was to measure state law, both civil and criminal, with respect to libel, slander and privacy, by constitutional standards, impressing on it the first amendment guarantees of free speech and press.[1] They did so in such a way as to grant immunity from punishment by way of damages, imprisonment, fine or otherwise to publishers of statements concerning the official conduct of public officials and concerning matters of public interest related to public figures. The immunity is by privilege to the published statements. The privilege extends to true statements and false statements.[2] With respect to true statements the privilege is absolute,[3] with respect to false statements it is conditional. The privilege is removed only from those false statements which are made with "actual malice." With regard to libel we consider the rule to be:

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[1] Of course it had long been firmly established that the freedoms secured by the first amendment to the Constitution of the United States against abridgment by the United States are similarly secured to all persons by the fourteenth amendment against abridgment by a state. See *Stromberg v. State of California*, 283 U.S. 359, 368-369 (1931). But defamation had generally been considered to be outside the scope of the first amendment. See, for example, *Beauharnais v. State of Illinois*, 343 U.S. 250 (1952). This appeared to be accepted even by advocates of the "absolutist" interpretation of the amendment. See Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 258. However, the question of measuring the common law of defamation by constitutional standards had arisen in connection with the absolute privilege of high-ranking government officials. See *Barr v. Matteo*, 360 U.S. 564 (1959); *Spaulding v. Vilas*, 161 U.S. 483 (1896). And in *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642 (1942) the Court was evenly divided on a question of libel to a public official.

[2] "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson, supra*, at 732.

[3] The *New York Times* rule "absolutely prohibits punishment of truthful criticism." *Garrison v. Louisiana, supra*, at 78. "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." Id. at 74.

The constitutional guarantees prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct or a public figure from recovering damages for a defamatory falsehood relating to a matter of public interest unless he proves that the statement was made with actual malice — that is with knowledge that it was false or with reckless disregard of whether it was false or not.

Our statement of the rule requires explanation and elaboration. It requires explanation as to why we think the reckless-disregard-of-truth standard is applicable equally with respect to public officials and public figures. It requires elaboration as to the meaning of terms used in stating it — "public official", "public figure" and "reckless disregard."

New York Times,[4] holding that "The Constitution delimits a state's power to award damages for libel actions brought by public officials against critics of their official conduct",[5] at 283, enunciated a rule applicable to such actions, at 279-280:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from re-

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[4] *New York Times* was characterized by one commentator as "a decision in which past doctrine intersects present events in so complex a way as to be the despair of the commentator, not only because its portent is almost beyond prediction, but also because it opens so many avenues for inquiry." Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191. From our consideration of opinions in other jurisdictions, we believe that it, and the progeny it sired, proved to be the despair also of trial courts and appellate courts.

[5] In so holding it rejected the argument that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application when a state court applies a state rule of law which it is claimed imposes invalid restrictions on constitutional freedom of speech and press. "It matters not that that law has been applied in a civil action and that is common law only, though supplemented by statute. * * * The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." At 265.

> covering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Although the rule by its terms was limited to "public officials", it seemed inevitable that the opinion would serve as a basis for expansion so as to affect those other than "public officials." This was realized in *Butts* and *Walker*, in which the ambit of constitutional concern was extended to "public figures", but it was done in such a way as to cast doubt on the standard to be applied to "public figures". The judgments of the Court, affirming the judgment in favor of Butts and reversing the judgment in favor of Walker, were announced by Mr. Justice Harlan who delivered an opinion in which Justices Clark, Stewart and Fortas joined. The Chief Justice delivered an opinion concurring in the results of both cases. Each of Mr. Justice Black, with whom Mr. Justice Douglas joined, and Mr. Justice Brennan, with whom Mr. Justice White joined, delivered an opinion concurring in the results of *Walker* and dissenting in *Butts*. The Harlan opinion noted that the two cases were brought to the Court "to consider the impact of [*New York Times*] on libel actions instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest." At 134. All the members of the Court were in agreement that the basic considerations underlying the First Amendment required that some limitations be placed on the application of state libel laws to "public figures" as well as "public officials." The Harlan opinion stated a rule, at 155:

> "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Mr. Chief Justice Warren expressly rejected this test, adhering "to the *New York Times* standard in the case of 'public figures' as well as 'public officials.'" Id. at 164. Justices Brennan and White joined the Chief Justice in this. Id. at 172. Justices Black and Douglas did not adopt either standard. They thought it was time for the Court to abandon *New York Times* and adopt the rule to the effect that the First Amendment was intended to leave the press free from harassment of libel judgments. Id. at 172. Thus the opinions did not announce a standard under which limitations were placed on the application of state libel laws as to "public figures" that had support of a majority of the Court. In these circumstances we are constrained to apply the *New York Times* standard with respect to public officials equally with respect to public figures. We are not persuaded that the critic of a public figure should be afforded less protection, if that is what the Harlan rule does, than the critic of a public official. We point out the subtle difference between the public figure and the public official found by Chief Justice Warren which moves in the direction of giving more protection, if there must be a distinction, to the critic of the public figure rather than to the critic of the public official. He said in his opinion in *Butts*, at 164, "The fact that [public figures] are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest [in the conduct of such persons], since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." And we point out that in *Hill* the actual malice standard was afforded to the publisher of an article which invaded the privacy of a private individual who was only involuntarily newsworthy. We make one more observation. It would seem that the distinction between proof establishing *highly unreasonable* conduct constituting an *extreme departure* from the standards of investigation and reporting ordinarily adhered to by responsible publishers and proof establishing reckless disregard for truth or falsity is so fine, if indeed there be a real distinction at all, as not to justify a further clouding of law of defamation by the adoption of the separate standard.

In elaboration we first consider when a person is to be deemed a "public official" or "public figure." *New York Times,* as to "public official", expressly begged the question. "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S., note 23, at 283. Although not defining "public official", the Court indicated, by referring to "categories of persons who would or would not be included", that the designation "public official" was not limited to "government employees." In *Rosenblatt* the Court observed that the question whether the respondent was a "public official" under *New York Times* was squarely presented. It first rejected the suggestion that whether or not a person is a "public official" should be answered by reference to state-law standards. "States have developed definitions of 'public official' for local administrative purposes, not the purposes of a national constitutional protection." At 84. But it found that no precise lines had to be drawn for the purposes of its decision. Asserting that the motivating force for the *New York Times* decision was twofold: (1) a strong interest in debate on public issues, and (2) a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues, it said, "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." At 85. The Court announced a test, at 86:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government em-

ployees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply."

Mr. Justice Douglas suggested in his concurring opinion that this test might apply to a night watchman accused of stealing state secrets. The majority referred to this in a footnote, note 13, at 86, and answered:

> "But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."

Butts and *Walker*, as we have noted, was concerned with "public figures". The Harlan opinion did not define "public figure". It did state, at 147-148:

> "From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction 'cannot be founded on the assumption that criticism of private citizens who seek to lead in the the determination of * * * policy will be less important to the public interest than will criticism of government officials.' Pauling v. Globe-Democrat Publishing Co., 8 Cir. 362 F. 2d 188, 196."

The Chief Justice in his opinion found no material distinction between "public figures" and "public officials". He said, at 163-164:

> "To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the

distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and

substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct."

There was no debate among the Court as to whether Butts and Walker were public figures. Seven of the members who deemed it necessary to pass on the question agreed that each was a public figure for First Amendment purposes. Walker was a retired United States general who could be fairly deemed to be a man of some political prominence. Butts was a nationally known football coach, then athletic director at a state university but privately paid. The Harlan opinion recognized that none of the particular considerations involved in *New York Times* was present in the two cases before it. The actions could not be analogized to prosecutions for seditious libel. Neither Butts nor Walker had any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. But both commanded a substantial amount of independent public interest at the time of the publications and both would have been labeled "public figures" under ordinary tort rules. The opinion reasoned that Butts may have attained his status of a public figure by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy — the enrollment of James Meredith as a student in the University of Mississippi. The Chief Justice, noting that both cases involved public figures, observed with respect to Walker: "Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest."

We gather from the whole of *New York Times, Rosenblatt* and *Butts* and *Walker* that the public official designation applies at the very least to those government employees who have, or appear to have, substantial responsibility for or control over the conduct of government

affairs. This would be so when his position in government has such apparent importance that the public has an independent interest in the qualification and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. But this public interest in the person must be apart from such interest as may be occasioned by the charges in controversy. While a person who is a public official is obviously a public figure, a person may be a public figure without being a public official. A person, not a public official, may be a public figure by position alone, as was Butts, or he may become a public figure by purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy as did Walker, or by seeking to lead in the determination of policy, or, because, by any reasoning, he is a public man in whose public conduct society and the press have a legitimate and substantial interest. In sum, for first amendment purposes, whether a person is a public figure, *vel non*, depends, within the guidelines set out, upon the facts and circumstances of the particular case.

We observe in passing that it is difficult for us to reconcile *Hill* with *Butts* and *Walker*. Decided about a year after *Rosenblatt* and five months before *Butts* and *Walker*, *Hill* applied the actual malice standard of *New York Times* to a statutory invasion of privacy action where false statements were made concerning a private person who was involuntarily newsworthy. The verdict in favor of Hill was upset five to four. Mr. Justice Brennan delivered the opinion of the Court and four other justices delivered opinions. The Brennan opinion stated that there was no doubt that the subject of the publication, the opening of a new play linked to an actual incident, was a matter of public interest. Thus it was "newsworthy" and being newsworthy was within the sphere in which state-law remedies for aggrieved individuals are subject to judicial review under the first amendment. Was Hill a "public figure" because by no choice of his own he was a part of the actual incident to which the play was linked? The

opinion did not say. It appeared to be the thesis of the opinion that "newsworthiness" defined the ambit of judicial concern rather than the status of the person aggrieved. But in *Butts* and *Walker*, neither the Harlan opinion nor the Warren opinion, in both of which the ambit issue was confronted again, called upon *Hill* but went back to *New York Times* to extend by analogy the basic protection set out in *New York Times*. And in *Hill*, the Court did not openly invoke *New York Times*. Are we to conclude, one commentator asks, that there are at present "two ambits of constitutionally protected speech, one appropriate only for false statements about individuals treated as privacy actions, the other reserved for false statements about individuals treated as libel actions."[6] We consider, until the Supreme Court indicates otherwise, that it saw *Hill* and *Butts* and *Walker* as presenting problems it wishes to keep separate.[7] We observe that in the Harlan opinion in *Butts* and *Walker* it was carefully pointed out: "Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, including our recent decision in Time, Inc. v. Hill." This statement was elaborated by a footnote, note 19 at p. 155: "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures [which we take to refer to the ambit of libel under New York Times as expanded by analogy] or matters of public interest [which we take to refer to the ambit of privacy under *Hill*]."

Next, in elaboration, we consider the reckless-disregard-of-truth standard. It is not the same as the reasonable-belief standard. "The test which we laid down in New

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[6] *Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker,* 1967 Sup. Ct. Rev. 267, 280-286. We have drawn in large measure on this excellent article in our discussion herein of *New York Times* and its progeny.

[7] We note that in *Hill* some of the published matters were claimed to be false. Thus it involved a comparatively new species of invasion of privacy — false light privacy. See Prosser, *Privacy,* 48 Cal. L. Rev. 383 (1960). Traditionally, invasions of privacy involved statements that were true, in distinction to defamation where the statements were alleged to be false.

York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison* at 79. It is when statements are "made with the high degree of awareness of their probable falsity demanded by *New York Times*", id. at 74, that they are made with reckless disregard for their truth. Or as was said in *St. Amant* at 731:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

But the Court warned, at 732:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

As to the degree of proof to show actual malice, it must be of "the convincing clarity which the constitutional standard demands", unassisted by presumptions based on falsity. *New York Times* at 285-286. And see *Beckley Newspapers Corp.* at 83.

We turn out to the case before us. The A. S. Abell Company (appellant)[8] was shown to have published a statement concerning Elizabeth C. Barnes (appellee),[9] which falsely[10] imputed to her the commission of a crime subjecting her to prosecution and punishment,[11] thus constituting a libel to her actionable *per se*. See *American Stores Co. v. Byrd*, 229 Md. 5, 13, citing *Dorsey v. Whipps*, 8 Gill 457, 462, and *Haines v. Campbell*, 74 Md. 158. The case was tried before a jury in the Baltimore City Court. At the close of all the evidence appellant moved for a directed verdict[12] and appellee moved for a directed verdict in her favor on the issue of liability. The lower court denied appellant's motion and granted appellee's motion, permitting the case to go to the jury on the question of damages. The jury awarded appellee $7500 for compensatory damages and made no award for punitive damages.

We have recognized an obligation, when the question is whether publications are obscene and thus without the protection of the first amendment, to make an independent constitutional judgment on the facts. *Sanza v. Md. Board of Censors*, 245 Md. 319, 330. We have the same obligation when the question is the effect of the first amendment on libelous publications, since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*, 357 U.S. 513, 525. "In cases where that line must be drawn, the rule is that we 'examine for our-

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[8] And cross-appellee and defendant below.

[9] And cross-appellant and plaintiff below.

[10] There was no plea of truth by way of justification, Maryland Rule 342 c 2 (h).

[11] The failure to file reports required of her by law as a candidate for the position of delegate to the Constitutional Convention. See the Corrupt Practices Act (Acts 1957, ch. 739) codified as Code, Art. 33, §§ 211-233. It was repealed by Acts 1967, ch. 392 which enacted new provisions. They were in turn repealed by Acts 1968, ch. 613 which enacted new provisions now codified under the subtitle "Fair Election Practices" as Art. 33, §§ 26-1 to 26-20.

[12] Appellant moved for a directed verdict at the close of the evidence offered by appellee. It was denied. Appellant thereafter offered evidence and in so doing withdrew the motion. Rule 552 b.

selves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L. Ed. 1295; see also One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352; Sunshine Book Co. v. Summerfield, 355 U. S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times,* at 285. See *Bachellar, et al. v. State of Maryland,* ..... U.S. ....., 7 Cr. L. 3051, decided 20 April 1970.

There was evidence, adduced through the testimony of appellee, that she had received the degree of Bachelor of Arts, cum laude, from Bryn Mawr College, and the degree of Bachelor of Laws, cum laude, from the University of Maryland. She was admitted to the practice of law in courts of this State and the federal courts in 1936. Shortly after her graduation and before her marriage, she assisted in research for the Restatement of Trusts of the American Law Institute, being so engaged for about a year and a half. It was elicited that while attending law school she "was very much interested in the study of constitutional law, and the reason for that was because my father had had many interesting cases as a Judge in the Federal Courts and discussed them with us at length at home, and then, of course, my husband has always been interested in it. So that I have, over a period of quite a number of years, I would say at least thirty years, been particularly interested in the study of constitutional law, and I have had occasion occasionally to write an article or two about it." When she became aware that there was to be a Constitutional Convention to consider a new constitution for Maryland, "I became vitally interested in that, because I felt I had some knowledge of the subject, and when the then Governor Agnew asked women and men who had experience in that field, or as ordinary citizens to take part in

the Constitutional Convention, I felt it was my duty to run, to be a candidate for the Constitutional Convention." She became a candidate. "So that when some of my friends who knew my interest suggested to me that I would be a good candidate, I felt doubly sure that that was the thing for me to do." She filed with the Board of Election Supervisors and designated a Treasurer. There was formed a "Citizens Committee for the Election of Elizabeth C. Barnes as a Delegate to the Maryland Constitutional Convention", with Bernard J. Flynn as chairman to promote her election. "Mr. Flynn used to be District Attorney under by father, Judge Chesnut, I remember in the Federal Court. He was a very distinguished lawyer and very much admired by everyone." A treasurer for the committee, the same person who served as Treasurer for appellee individually, was properly designated. The Treasurer for appellee individually received funds as election contributions from members of the public and a report of receipts and disbursements was filed as required. On cross-examination appellee said that she recognized the Constitutional Convention as a matter of considerable public importance, that she considered the matter of who should serve in the convention a matter of great public concern and for that reason she finally determined to submit herself as a candidate. She identified a letter sent out before the election over the signature of Mr. Flynn as Chairman of the Citizens' Committee. "Our committee decided that we would like to give Elizabeth C. Barnes some support. So we decided to send out a letter to our people whom we considered might be interested in voting for me, and we asked for subscriptions to our campaign to those who would be glad to support us. It set out my services, stated that I held a law degree as a member of the Bar, both Federal and State, and that I was active in patriotic organizations, and worked in Civil Defense, and asked those who would like to join in support." She did not know to how many people it was mailed. The letters were either printed or mimeographed. The salutation on the letter was "Dear Fellow Citizens." It stated that appellee, "known for her life long service to the community of the 5th Legislative District, has filed

for election to the Constitutional Convention." It continued:

> "Certain changes in the basic structure of the Maryland Constitution are being proposed. Are you aware of what these changes involve and how they will affect you and your family in the future? If you are concerned in preserving the freedoms guaranteed by our present State Constitution, we urge you to vote for Elizabeth C. Barnes to represent you in the Constitutional Convention.
>
> Elizabeth C. Barnes is determined to preserve in the new Constitution the basic system of checks and balances so necessary for maintenance for our people's freedom. She will support efforts to eliminate obsolete Constitutional provisions but will vote to retain basic Constitutional freedoms.
>
> Well qualified to represent our district, Elizabeth C. Barnes holds a law degree from the University of Maryland School of Law where she studied Constitutional Law and graduated cum laude. A member of the Maryland and Federal Bars, Mrs. Barnes was awarded a Presidential citation for her work with the Civilan Mobilization Corps during World War II. She is active in numerous civic and patriotic organizations and helped organize the Schenley Road Community Center to alleviate juvenile delinquency in one of the important sections of our district. For many years she served as Deputy District Coordinator for the Northern District for the Civil Defense Organization of Baltimore City.
>
> Join us in support of Elizabeth C. Barnes, VOTE for her on JUNE 13th and ask your friends to do the same. Any contributions you can make to insure our Candidates election will be greatly appreciated. Please send contributions to Phyllis M. Chait, Treasurer, 4546 North Charles Street, Baltimore, Maryland, 21210."

The letter was proffered by appellant and received in evidence. Appellee was not elected a delegate to the Convention.

On these facts it is our independent constitutional judgment that appellee was not a public official but was a public figure. She held no elective office; she was not a government employee; she had no position in government; thus she was not a public official. However we find that she was a public figure whether it be considered that she became such by her position as candidate for election as delegate to the Constitutional Convention; or by the purposeful activity on her part amounting to a thrusting of her personality into the vortex of an important public controversy; or by seeking to lead in the determination of policy in an important public matter; or because simply by her candidacy and campaigning she became a public person in whose conduct society and the press had a legitimate and substantial interest. Having so attained such status, she would not lose it in the short lapse of time between the election and the publication of the defamatory article. The statements published were obviously related to her as a public figure and were matters of public interest. Within the frame of reference of the false statements she was a public figure.

Because appellee was a public figure, appellant stood protected by the shield of privilege provided by the first amendment. This shield could only be removed by appellee showing with convincing clarity that appellant published the false statement with actual malice. But the shield was not so removed; it was stripped from appellant by the lower court without regard to the constitutional guarantees by the grant of appellee's motion for a directed verdict in her favor on the issue of liability. There was squarely before the lower court by the pleadings,[13] by argument of counsel during trial and by the granted motion itself,[14]

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[13] Appellant pleaded the general issue and the constitutional guarantees of free speech and press, alleging appellee was a public figure and denying that the published statements were a calculated falsehood.

[14] One of the stated grounds for the motion was that appellant had produced no evidence sufficient to prove that the contents of the publication were privileged.

that appellant was relying on the constitutional guarantees of free speech and press. Appellant's counsel made clear to the court that the defense was the immunity afforded appellant under *New York Times* and its progeny. It was the duty of the court in the circumstances to determine in the first instance whether the proof showed appellee to be a public official or a public figure. *Rosenblatt* at 88.[15] It did not do so. Rather it found that because the statements were libelous *per se* appellant was without the ambit of constitutional concern and, implicitly, that it was not material whether or not appellee was a public official or a public figure or whether or not the false statements were made with actual malice. It said, in denying the motion:

> "We don't consider that the Federal Cases that we have read, that there is a constitutional question here involved, because the per se, the per se involves the accusation of criminal acts. It's a statement of fact, which it turns out, was not true. And I think it goes beyond the rulings of the Supreme Court in these cases."

This was patently incorrect. "The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey v. Alabama,* 219 U.S. 219, 239, as quoted in *New York Times,* at 284, which continues, quoting with approval *Lawrence v. Fox,* 357 Mich. 134, 146 N.W. 2d 719, 725 (1959), "[t]he showing of malice required for the forfeiture of the privilege is not presumed but is a matter of proof by the plaintiff * * *." We hold that the grant of appellee's motion was error requiring reversal.[16]

We also find error requiring reversal in the denial of appellant's motion for a directed verdict made at the close

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[15] *Rosenblatt* remarks, note 15 at 88: "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions."

[16] Appellee concedes this in her brief, stating, "If there is such legally sufficient evidence [that she was a public official or a public figure], then the judgment should be reversed * * *."

of all the evidence. Appellee presented her case on the theory that the false statements were actionable *per se*.[17] But it was appellee's burden, once the evidence adduced by her established that she was a public figure, to prove with "convincing clarity" that the statements were made with actual malice. We cannot say, exercising our independent constitutional judgment on the facts, that the evidence she offered, concerned primarily as it was to proof of publication, the content of the publication, and that the statements in it were false, was sufficient to permit the conclusion that appellant knew the statements were false or in fact that it entertained serious doubts as to the truth of the publication. The author of the article published, a reporter employed by appellant, testified. He described the procedure he followed by which he ascertained to his satisfaction that appellee had not filed the report required. Two days after the election, he had gone with a colleague to the office of the Clerk of the Circuit Court of Baltimore City where the candidates' financial reports were to be filed. Together they examined the file drawers which contained papers filed by 344 candidates and committees. Since they had been told that a candidate's financial report would be interleaved with the paper designating the candidate's treasurer, the reporters removed from the file box only those bundles which contained no financial statement, and made a list of the names of the candidates. The reporters removed the file marked "Phyllis M. Chait Treasurer for Citizens Committee for Election of Elizabeth C. Barnes" inadvertently assuming it to be the file for Mrs. Barnes' Treasurer. Finding no financial report, they placed Mrs. Barnes' name on the list of candidates who had failed to file financial reports. In fact, interleaved with the designation of Mrs. Barnes' own treasurer (who was also Mrs. Chait) was the required financial report, which was overlooked, since under the procedure followed by the reporters, only the bundles containing no financial reports were removed from the files. In this

[17] At the close of evidence offered by her the court observed: "The entire theory of your case is per se." Appellee's counsel replied: "That is our position."

fashion, there was compiled a list of the names of 86 candidates who had failed to file the required financial reports. Only in Mrs. Barnes' case was there an error.

There is no evidence to support a conclusion that he *knew* the statement that appellee had not filed the report was false. And if it be assumed that his investigation was not thorough, that he was negligent in the conduct of it, and that a reasonably prudent man would have taken other steps before making the statement, none of this would be sufficient to show that appellant published the statements with the high degree of awareness of their probable falsity demanded by the test. Reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. See *Beckley Newspapers Corp.* at 84-85. The evidence here showed that appellant did not simply fabricate the story, or that it was the product of appellant's imagination, or that it was based wholly on unverified information anonymously received or that the statements were so inherently improbable that only a reckless man would have put them in circulation. Nor was the evidence sufficient to establish that there were obvious reasons to doubt the veracity of the reporter or the accuracy of his reports. In her brief appellee points to the contents of the article and the manner in which it was presented, that the reporter failed to produce notes of his investigation or the original article and the inadequacy of the investigation as sufficient to permit a finding of actual malice. We have noted that the inadequacy of the investigation was not sufficient to show actual malice. And we cannot say that the content of the publication and the manner in which it was presented were sufficient to support a finding under the required test that appellant knew the statements were false or made them with reckless disregard of whether they were false or not. Nor do we think, under the circumstances shown, that actual malice can be inferred from the failure of the reporter to produce his notes or the original of the article. In short, we find that the evidence, in law, was not sufficient to permit the conclusion that appellant published the statements with actual malice — that is, either that he

knew they were false or entertained serious doubts as to the truth of his publication. The evidence was not of the convincing clarity which the constitutional standard demands.[18] Therefore, the lower court committed reversible error in denying appellant's motion for a directed verdict made at the close of all the evidence.

Appellee urges that in the event the judgment is reversed, the case should be remanded "for a new trial and the submission of the case to the jury upon the issue of actual malice as federally defined if the jury should find the Appellee to be a 'public official' or that the investigation by the publisher was so inadequate as to constitute an extreme departure from ordinary publishing standard if the jury should find the Appellee to be a 'public figure'."[19] On the

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[18] During argument out of the presence of the jury at the close of all the evidence, at which time there were pending before the court appellant's motion for a directed verdict and appellee's motion for a directed verdict in her favor as to liability, appellee's counsel discussed the evidence as to malice which had been adduced. The discussion was apparently on the question of punitive damages and was provoked by the indication of the court that it felt that there was no evidence of actual malice. Appellee's counsel said:

> "The proof of actual malice, it would seem to me in all candor, to be somewhat weak. However, I feel that there is some element of that in there, and that is in what seems to me to be peculiar news treatment of the plaintiff. Number one, that she is the only one in the article whose spouse was mentioned. Number two, the placement within the article of her name immediately above the subheading, regarded as criminal. Number three, the fact, although the reporter says he did not know that she was an attorney, that her name was coupled with two other men and singled out for treatment differently than accorded to the other people who the article charged did not file. Now, admittedly, I don't think that this is a strong showing of actual malice, but I think that is for the fact finder to determine. What the main thrust of our point is, the fact that the malice is inferred from the publication of the article in question."

None of the points mentioned meet the standard of New York Times. We point out that not only must the evidence show reckless disregard with convincing clarity but it must do so without any presumptions arising from falsity.

[19] Of course, we have already determined, *supra*, that the "actual malice" test applies equally with respect to public officials and public figures.

other hand, appellant claims in reply that there was no evidence of actual malice within the meaning of *New York Times* and its progeny. It urges that as appellee was seeking to recover punitive damages and "consequently, had every reason to introduce any evidence available to her which would show actual malice, including any which would show knowing falsity or reckless disregard of truth or falsity" and as she "produced no such evidence when it was germane to an issue in the case", remand is pointless, particularly since the evidence necessary to establish malice under the *New York Times* rule is greater in quantum than that needed to show actual malice under state libel rules.

The case was tried in the full glare of *New York Times* and its progeny.[20] As we have pointed out appellant made clear that it was relying on first amendment guarantees of freedom of speech and press in its pleadings and arguments during trial. Despite this, appellee was content to rely on the fact that the publication was libelous *per se*, standing on the common law presumption of malice arising on such publication. We note, however, that she was seeking punitive damages and a showing of actual malice in the common law sense, at the least, would have probative value with respect to the amount awarded, even if such showing would not be required to permit the jury to find punitive damages (which point we do not consider). The case was fairly tried as far as appellee was concerned. If she could have adduced evidence sufficient to prove actual malice in the constitutional sense, we think it a reasonable conclusion that she elected not to do so. We

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[20] We observe that in *Greenbelt Cooperative Publishing Association, Inc., et al. v. Bresler*, 253 Md. 324 (1969), now before the Supreme Court on writ of certiorari to this Court, 396 U.S. 874 (1969), there was no question before us with respect to the status of Bresler as a public official or public figure or the test to be applied to prove actual malice. It was conceded that he was a public figure and the case went to the jury on a charge, without objection, imposing upon him the burden to prove actual malice within the *New York Times* rule. In *Bresler* we did discuss the sufficiency of the evidence to establish actual malice but we do not believe that the facts there and the facts here are apposite.

held in *Petropoulos v. Lubienski,* 220 Md. 293, 302, where a builder had failed or overlooked to prove with certainty the value of his services, that he was not entitled to a remand for the purpose of supplying the proof omitted, after finding the lower court not clearly erroneous in disallowing a claim therefor on lack of such proof. In the circumstances here, we do not think that appellee is entitled to a remand for the purpose of supplying proof, if she could, of actual malice in the constitutional sense.

We are fully aware that the test here applied to prove actual malice is a harsh one and that proof under it is difficult. But the Supreme Court recognized this and was not deterred. It said in *St. Amant,* at 731-732:

> "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."

In view of our holding, we do not reach the question presented on the cross-appeal.

Judgment Reversed; Costs
To Be Paid By Appellee.

APPENDIX B

June 9, 1970

On Petition for Rehearing or, in the Alternative, for Modification of Opinion and Proposed Mandate

Before Hammond, C. J., Finan, Singley, Smith, Digges, Murphy, Robert C. (Specially Assigned) and Orth, Charles E., Jr. (Specially Assigned) J.J.

June 9, 1970

Per Curiam:

MOTION DENIED.